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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1934.

No. 142

NOAH STEWART, *Appellant,*

vs.

ROBERT KEYES, *ET AL., Appellees.*

BRIEF *of* APPELLANT.

This is an appeal from the Supreme Court of Oklahoma.

The official report of the opinion delivered in the court below is found in 167 Okl. 531.

The grounds of jurisdiction on appeal are that the Supreme Court of Oklahoma held invalid, as applied to the situation here presented, section 2 of chapter 115 of the Act of Congress of April 12th, 1926, 44 Stat. 239, and also applied the state statute of limitations as against the contention of appellant, made in that court, that the state statute could not be applied because in conflict with the laws of the United States.

The grounds of jurisdiction have been argued by appellant in a separate brief opposing the motion of appellees

to dismiss for want of jurisdiction. To this brief appellees filed a reply. Probable jurisdiction has been noted.

The statute of the United States, the validity of which is involved, is section 2, chapter 115 of the Act of Congress of April 12, 1926, 44 Stat. 239, which reads as follows:

> "*Sec. 2.* The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said state: *Provided,* that no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this Act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations."

Statement of the Case.

The appellant Noah Stewart is an enrolled full-blood Creek Indian, enrolled as 7 years of age at date of enrollment, January 23rd, 1900 (R. 18B). Lizzie Toney was a full-blood Creek Indian (R. 17). In 1902 the lands involved in this action were allotted and patented to the heirs of Lizzie Toney. Appellant was one of the heirs (R. 17-18). Restrictions on the alienation of the land were never removed by the Secretary of the Interior (R. 19). The opinion (R. 1-5) shows a purported guardian of appellant as an incompetent sold his interest in the land and made a guardian's deed which was filed for record on July 12th, 1916. On August 4th, 1917, the County Court made an order discharging the guardian. On April 11th, 1928, appellant brought his action for the recovery of his interest in the land, contending the guardianship was void and that the guardian's sale was void. The appellees demurred to appellant's evidence on the ground, among others, that appellant's cause of action was barred by the statute of limitations. The trial court sustained the demurrer. On appeal appellant contended the statute before quoted gave him until April 12th, 1928, in which to bring his action free from any bar of the statute of limitations and that the state statute of limitations did not apply to his action.

The Supreme Court of Oklahoma held in effect that prior to the enactment of the statute of the United States (44 Stat. 239) before quoted, the state statute of limitations had operated to transfer the title to the property in controversy to the appellees and that to allow the said statute to be given effect in this action would be to deprive appellees of their property without due process of law. It, therefore,

affirmed the judgment of the trial court, the affirmance being placed upon the sole ground that appellant's action was barred by limitations.

Appellant has taken an appeal to this court.

The decisive question in the case is whether prior to April 12th, 1926, the statute of limitations of Oklahoma had operated to transfer title to the property in controversy to the appellees.

ASSIGNMENTS of ERROR.

Appellant's assignments of error are as follows:

1. The Supreme Court of the State of Oklahoma erred in that it held that plaintiff's action, which was brought on April 11th, 1928, was barred by the statute of limitations and in so holding it erroneously held against the validity of the provision of section two, chapter 115 of the Act of Congress approved April 12th, 1926 (44 Stat. 239), which gave Noah Stewart, the plaintiff in error, the right as a restricted Indian to have until April 12th, 1928, in which to bring his action free from any bar of the statute of limitations.

2. The Supreme Court of the State of Oklahoma erred in not rendering judgment for the plaintiff in error as prayed for by him.

ARGUMENT.

The argument will be devoted to sustaining the single proposition that prior to April 12th, 1928, the title of appellant to what was formerly part of the tribal lands of the Creek Nation could not be alienated by the operation of the Oklahoma statute of limitations, and that his action was not, therefore, barred by that statute of limitations.

The sole ground in the opinion of the Oklahoma Supreme Court for holding the statute before quoted did not give appellant until April 12th, 1928, to sue, was that the title to the property in controversy had passed to appellees by operation of the statute of limitations prior to the time the statute was enacted. Further, that is the only ground of objection which could be made to said statute.

The Oklahoma court during the period when the statute of limitations was running, if applicable, held the statute of limitations not applicable and after the expiration of the time when the statute had fully run, if applicable, held such statute applicable. The earlier decisions held inherited lands of full-blood Indians of the Five Civilized Tribes to be restricted. The late decisions held such lands to be unrestricted for the reason that it held restrictions on the alienation of such lands had been removed by section 9 of the Act of May 27, 1908, which holding is in direct conflict with the holding of this court in *Parker* v. *Richard*, *infra*.

The index at the front of the brief contains the various points made.

The historical setting for the case is briefly as follows:

Originally the lands in the eastern part of what is now the State of Oklahoma were held in common by the Five Civilized Tribes. The Act of Congress of May 2nd, 1890 (26 Stat. 81), section 31, extended over Indian Territory certain named chapters of Mansfield's Digest of the Statutes of Arkansas so far as not locally inapplicable or in conflict with any law of Congress. Thereafter by treaties or statutes the lands of the Five Civilized Tribes were alloted in severalty among their members. The Acts of Congress placed various restrictions on the alienation of such formerly tribal lands. The latest of the general acts with regard to restrictions is that of May 27, 1908 (35 Stat. 312). These statutes are set out in Mills' Oklahoma Indian Land Laws, published in 1924.

Oklahoma was admitted as a state on November 16th, 1907. By section 1 of the Enabling Act (34 Stat. 267) the authority of the United States over the Indians and their property in the territories, which were formed into the State of Oklahoma, was expressly reserved.

I.

Except where title to property has passed by reason of a statute of limitations, the legislature may give further time in which to sue even though the time limited by the previous statute has fully run.

—*Campbell* v. *Holt*, 15 U. S. 620, 29 L. ed. 483;

Arcadia Mills v. *Carolina C. & O. Ry.*, 293 Fed. 639, at 645;

Stanley v. *United States Railroad Administration*, 271 Fed. 794;

United States v. *Chicago & E. I. Ry. Co.*, 298 Fed. 779.

II.

The authority of the United States over full-blood Indians and their property is supreme and its authority over such Indians and their property was expressly reserved by section 1 of the Oklahoma Enabling Act (34 Stat. 267). And inherited lands of full-blood Indians of the Five Civilized Tribes are restricted lands.

After referring to the fact that the right to legislate concerning Indians was reserved to Congress by the Oklahoma Enabling Act, this court in *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488, at 493, 68 L. ed. 803, at 808, said:

> "Congress was thus careful to preserve to the United States the authority over the Indians, their lands and property, which it possessed prior to the passage of the Enabling Act; retaining full power, which it had exercised from the earliest period, to deal with them as dependent people, and legislate concerning their property with a view to their protection; with the right to determine when, in their interest, the government guardianship should cease, and plenary authority, notwithstanding the bestowal of federal citizenship upon them, to place restrictions upon their right of alienating the lands allotted to them. *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 309 * * *."

The term allotted lands is here used as inclusive of allotted lands which have been inherited by members of the Five Civilized Tribes. For *Marchie Tiger* v. *Western Investment Co., supra*, which is cited as authority, was a case concerning restrictions on conveyances by full-blood Indian heirs of allotted lands inherited by them and held such inherited lands to be restricted.

Parker v. *Richard*, 250 U. S. 235, 63 L. ed. 954, finally settled the question whether allotted lands after being in-

herited by full-blood members of the Five Civilized Tribes are still restricted by holding as follows:

> "1. *Lands inherited from a Creek allottee by a full-blood Indian heir were not freed from the restrictions on alienation* imposed by the Act of May 27, 1908 (35 Stat. at L. 312), Chap. 199, by the provision of #9 of that act, that the death of any allottee shall operate to remove all restrictions upon the alienation of the allottee's land, '*provided*, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,' since, as to this class of heirs, restrictions are not removed, but are merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval."

Other cases holding inherited lands to be restricted lands are:

> *Brader* v. *James*, 246 U. S. 88, 62 L. ed. 591;
> *Talley* v. *Burgess*, 246 U. S. 104, 62 L. ed. 600.

This court in *Bunch* v. *Cole*, 263 U. S. 250, at 252, 68 L. ed. 290, at 292, said:

> "The power of Congress to impose restrictions on the rights of Indian wards of the United States to alienate or lease lands allotted to them in the division of the lands of their tribe is beyond question; and, of course, it is not competent for a state to enact or give effect to a local statute which disregards these restrictions or thwarts their purpose. *Marchie Tiger* v. *Western Invest. Co.*, 221 U. S. 286, 316; • • • *Brader* v. *James*, 246 U. S. 88, 96; • • • *Mullen* v. *Pickens*, 250 U. S. 590, 595. • • •"

While this case concerns an original allotment, the three cases above cited to sustain the opinion concern deeds made by heirs. It is obvious that to permit inaction by a full-blood Indian to alienate his title would thwart the pur-

pose of an act which allowed alienation only upon approval of a federal agency.

Conner v. *Cornell*, 32 F. (2d) 581, *certiorari* denied 280 U. S. 583, held that the authority of the United States with regard to tribal lands inherited by Creek Indians was such that a dismissal with prejudice by the Attorney General of the United States of an action brought by the United States to recover inherited land of an adult Creek Indian conveyed by deed approved by the County Court operated to bar an action by the Indian to avoid the deed.

Kiker v. *United States*, 63 Fed. 957, sustained an action brought by the United States to recover inherited land conveyed by a full-blood Seminole Indian by deed approved by the County Court.

III.

The Oklahoma court correctly held that the effect of the Oklahoma statute of limitations relating to the recovery of real property, where applicable, is to transfer the title to the property to the adverse occupant.

—*Stolfa* v. *Gaines*, 140 Okl. 292;

and other Oklahoma cases quoted from under IV.

This court in *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532, 48 L. ed. 291, said:

> "Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

Other cases stating that the effect of statutes of limitations relating to real property is to transfer the title are:

Campbell v. *Holt*, *supra*;
Sharon v. *Tucker*, 144 U. S. 533, 36 L. ed. 532.

IV.

Until recently the Oklahoma courts uniformly held that prior to April 12th, 1928, the state statute of limitations could not apply to actions brought by full-blood Indians to recover their inherited lands for the reason that their lands could not be alienated by a state statute of limitations which had not been put in force by some Act of Congress.

In the case of *Patterson* v. *Carter*, 83 Okl. 70, it was sought to defend against an attack upon a void guardian's deed by setting up the statute of limitations. The opinion in holding the statute of limitations was not applicable said:

> "In the first place, it is well settled that an Indian who is under the guardianship of the United States cannot be divested of his restricted lands, whether acquired by allotment or *inheritance*, in any manner except that provided for by some Act of Congress."

In *Lytle* v. *Fulotka*, 106 Okl. 86, 233 Pac. 456, the opinion states:

> "Plaintiffs were the heirs at law of one Toby Kelley, a full blood Creek Indian, who was the sole heir of Sukie Kelley, to whom the land in controversy was allotted as her proportionate part of the lands of the Creek Nation. She died before receiving her allotment, and patents were issued in the name of her heirs, August 6th, 1904."

The opinion showed that the guardian of Toby Kelley, who had been adjudged incompetent, made a void deed to this land. His heirs sued for its recovery. The defendants pleaded the statute of limitations. The court said:

> "*3.* The plaintiffs in error have pleaded the statute of limitations. So far as Toby Kelley is concerned, it is plain that his interest in the land in question could be divested only in the manner authorized by federal

statute, to-wit, by a sale through the probate court. Having failed to obtain title in this manner, the purchasers could not obtain title by invoking the statute of limitations. The five years' statute of limitations against recovery of lands sold at judicial sale, saving to minors three years after removal of disability, does not apply to actions commenced by restricted Indians for the recovery of their restricted lands. Mills' Oklahoma Indian Land Laws, Sec. 338, citing *Patterson, et al.*, v. *Carter*, 83 Okl. 70, 200 Pac. 855, and other cases."

Other Oklahoma cases holding that lands inherited by full-blood Indians, who are members of the Five Civilized Tribes, are restricted and that, therefore, the statute of limitations of Oklahoma could not bar their recovery, are:

Baldridge v. *Caulk*, 110 Okl. 185, at 189;
Tobley v. *DeKinder*, 110 Okl. 63, at 65;
McLish v. *White*, 97 Okl. 150;
Curry v. *Browning*, 123 Okl. 106;
Anthis v. *Drew*, 123 Okl. 18.

The opinion in *Baldridge* v. *Caulk, supra*, said:

"We are further of the opinion that the interest of the heirs who are restricted from alienating their interest by the laws of the United States could be conveyed only in the manner provided by the laws of the United States, and that such heirs could not be divested of their title by a state statute of limitations."

The opinion in *Tobley* v. *DeKinder, supra*, said:

"As we view the case, the question is not whether the creation of a new disability by Congress would arrest the running of the statute of limitations under ordinary circumstances, but whether the government, through Congress, in the exercise of its continuing guardianship over the plaintiffs, having taken the field

and legislated concerning the sale and disposition of inherited lands owned by them, did not thereby exclude every other mode of acquiring title to such lands, including title thereof acquired by adverse possession under local statutes of limitations, where such title depended in part for its validity upon adverse possession held after the Act of Congress became effective."

Other Oklahoma cases holding such inherited lands restricted and, therefore, not subject to the application of various Oklahoma statutes which by their terms would affect the alienation of the title to such lands, are:

Coleman v. *Battiest*, 65 Okl. 71;
Lewis v. *Gillard*, 70 Okl. 231;
Hoodenpyl v. *Champion*, 71 Okl. 270;
Eysenbach v. *Naharkey*, 114 Okl. 217;
Canfield v. *Jack*, 78 Okl. 127;
Murrow Indian Orphan's Home v. *McClendon*, 64 Okl. 205;
Malone v. *Wamsley*, 80 Okl. 181, cited approvingly in
Sperry Oil and Gas Co. v. *Chisholm, supra.*

V.

The reasoning of those Oklahoma cases is sustained by the language used by this court in *Sperry Oil & Gas Co. v. Chisholm, supra*, page 494 of 284 U. S.

This court there said:

"And in all matters relating to the restrictions upon their allotted lands resort must be had to the Acts of Congress and to those acts alone. *Walker* v. *Brown*, 43 Okl. 144, 141 Pac. 681; *Collins Invest. Co.* v. *Beard*, 46 Okl. 310; *Wilson* v. *Greer*, 50 Okl. 387, 151 Pac. 629; *Smith* v. *Williams*, 78 Okl. 297, 190 Pac. 555; *Malone* v. *Wamsley, supra.*" (80 Okl. 181.)

Malone v. *Wamsley*, cited above, dealt with inherited land. It quoted approvingly the following:

> "The reason the state cannot legislate for an Indian of the Five Civilized Tribes is that Congress has reserved the right to legislate for him as a dependent people."

The case of *Sperry Oil & Gas Co.* v. *Chisholm* also cited *Marchie Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309, as authority, which latter case dealt with inherited land of a Creek full-blood Indian.

It is clear that tribal lands in the hands of full-blood Creek Indians are subject to the control of the United States whether obtained by direct allotment or by inheritance. Appellant, however, received the land in controversy by direct allotment.

VI.

The cases cited by the Oklahoma court to sustain its conclusion that:

> **"The right of the plaintiff to have the guardian's deed in question cancelled was barred by the applicable statutes of limitations prior to the commencement of this action, even though, as contended by the plaintiff, that deed was *void*,"**

are not applicable and for the most part were not Indian cases. The Indian cases are not applicable and were not correctly decided.

As before pointed out cases stating general rules of law are not decisive as to questions arising relating to restricted Indians.

—*Bunch* v. *Cole*, *supra*.

The case of *Harris* v. *Bell*, 254 U. S. 103, 65 L. ed. 159, is cited. That case merely held that heirs are not governed by the restrictions on alienations applicable to living allottees and that adult heirs are under different restrictions from mipor heirs. The opinion was written by Mr. Justice VAN DEVANTER and was rendered November 15, 1920. *Parker* v. *Richard, supra,* was also written by Mr. Justice VAN DEVANTER. There is no conflict between the two opinions.

Of the Oklahoma cases cited, the first which is a restricted Indian case is *Dierks* v. *Isaac,* 114 Okl. 158, 244 Pac. 750. That case, however, concerned a guardian's deed of the land of a minor while the deed in this case concerned the land of an adult. That case was decided on the theory that the land of a full-blood Indian minor is not restricted land.

The writer of the opinion was Mr. Justice PHELPS. At a later time he concurred in an opinion written by Mr. Justice RILEY in No. 16989, *Critchlow* v. *Bacon,* XLVIII Oklahoma Appellate Court Reporter 198, in part as follows:

> "Summarizing the facts here:
>
> "Ellen Bacon, a full-blood Indian minor, inherited an undivided one-half interest in certain royalties from Silly Frazier, a full-blood Indian. During Ellen's minority her undivided one-half interest in these royalties were sought to be disposed of by a procedure beyond the jurisdiction of the County Court. Ellen died March 19, 1918, and her father, Dan Bacon, a full-blood Indian, inherited the interest from her. More than five years after the purported guardianship sale and on October 8, 1923, Dan Bacon instituted the present action. His suit was commenced less than five years from December 28, 1918, when he executed his deed.
>
> "We are of the opinion that it was the intention of Congress under the proviso to section 9 of the Act

of May 27, 1908, c. 199, 35 Stat. 312, that lands of a deceased allottee should be restricted as long as the same were inherited by full-blood heirs and until the restrictions upon such lands should expire by operation of law, which under the provisions of the act, would be April 26, 1931. *Brown* v. *Marshall*, 83 Okl. 98; *Thompson* v. *Smith*, 227 P. 77. • • •

"*Bell* v. *Fitzpatrick*, 53 Okl. 574, 157 P. 334, holds that the statutes of limitation are never set in motion by a void conveyance to an Indian minor's allotted land. *Burkhalter* v. *Vann*, 59 Okl. 114; *Bluejacket* v. *Everett*, 42 S. Ct. 442.

"In *Patterson* v. *Carter*, 83 Okl. 72, it was held concerning a federal restriction, that an Indian 'cannot be divested of restricted lands, whether acquired by allotment or by inheritance, in any manner except that provided by some Act of Congress' and that only 'in the manner provided by law.' *Baldridge* v. *Calk*, 110 Okl. 185; *Blonset* v. *Cardin*, 41 S. Ct. 519; *McLish* v. *White*, 97 Okl. 150.

"In *Parker* v. *Richards*, 39 S. C. 442, the Supreme Court of the United States held relative to removal of restrictions on alienation of allotted lands by the death of the allottee:

> 'In other words, as to that class of heirs (full-blood Indian heirs) the restrictions are not removed, but merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval • • • entertaining a like view of the proviso, we conclude that the land covered by the lease *is still restricted land* • • •. The heir is a full-blood Indian, as was the allottee, and is regarded by the act as in need of protection, as was the allottee.'

"We hold, therefore, that the lands were restricted lands at the time of the conveyance of royalties in 1916, and compliance with the laws of Oklahoma was essential to alienation of the ward's realty.

"Just as was held in *Tirey* v. *Darneal*, 37 Okl. 608, 133 P. 614:

> 'Section 6 of the Act of Congress approved May 27, 1908 (35 Stat. at L. 313, c. 199), which deals with the subject of the removal of restrictions from the lands of allottees of the Five Civilized Tribes provides that the persons and property of minor allottees of said Five Civilized Tribes, shall, except as otherwise specifically provided by law, be subject to the control and jurisdiction of the probate courts of the State of Oklahoma. This provision of that act is in the nature of a restriction by Congress on the alienation of land belonging to minor allottees, and can be removed only through the instrumentality of the County Court.'

We hold that the guardian's deed failed to convey the interest of the minor.

"We have reviewed *Dierks* v. *Isaac* (July 7, 1925), 114 Okl. 158, cited as supporting the contention of plaintiff in error. There the purchase price was paid. It was adequate. Appraisers were appointed. It did not affirmatively appear that appraisement was had. It was there held the restriction concerning such inherited land was a personal restriction rather than a restriction upon the land. The conclusion was there reached because the deed was not void on its face. There was a conveyance and the land passed into the possession of the purchaser and so remained ten years before suit. But here the deed is void on its face—the deed concerns royalty—possession of the surface did not pass with the guardian's deed. We hold the cited case not decisive of the issue here, for here the approval of the void deed conveyed nothing.

"In *Chupco* v. *Chapman, supra*, the sale had been made 'in all respects as now provided by the laws of the state * * *.' Not so in the case at bar. There it was said 'in fact no serious contention is made that said

sales were void on account of any defect in the proceedings under the probate laws of the state.'

"Other cases bearing upon the subject of limitations are *Lytle* v. *Fulotka*, 106 Okl. 86, 233 P. 356; *Brown* v. *Menshall*, 83 Okl. 98.

"We are of the opinion that this cause of Dan Bacon is not barred by the statute of limitations. Having so held we see no reason for further considering the position of the parties claiming benefit of the statute, nor the alleged acts of fraud on the part of the plaintiffs in error as precluding them from asserting the statute of limitation."

It is true that the opinion in that case was later set aside as to another issue in the case and a new opinion was written, *Critchlow* v. *Bacon*, 142 Okl. 168, which does not mention limitations.

As opposed to the contention that the lands of Indian minors which under the Act of May 27th, 1908, may be lawfully sold through the County Court are not restricted, we call attention to the case of *O'Conner* v. *Johnson*, 107 Okl. 5, at 8, which says:

"This provision is tantamount to a restriction upon the sale * * *."

The other Indian cases cited to sustain the holding are:

Bearhead v. *American Investment Co., et al.*, 157 Okl. 84, 10 P. (2d) 1086 (April 26, 1932);

Washington v. *Bartlett*, 158 Okl. 218, 13 P. (2d) 132 (July 19, 1932);

Givens v. *Jones*, 158 Okl. 124, 12 P. (2d) 892 (June 28th, 1932);

Deere v. *Gypsy Oil Co.*, 160 Okl. 237, 15 P. (2d) 1086 (March 29th, 1932).

All these cases concerned sales made by guardians of full-blood Indian minors. They do not involve a sale made by a guardian of an adult full-blood Indian. None of these cases was correctly decided. None of the opinions in these cases was based on correct principles of law. *Deere* v. *Gypsy Oil Co.*, *supra*, holds:

> "Under the provisions of section 9 of the Act of Congress of May 27, 1908, the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's land."

This holding is squarely contrary to the holding of this court in *Parker* v. *Richard*, *supra*.

These cases erroneously fail to distinguish between a case where there is no right to alienate at all and a case where there is a right to alienate upon compliance with federal law. Under the doctrine of *Parker* v. *Richard*, *supra*, and *O'Conner* v. *Johnson*, *supra*, the land is restricted in both cases. But these late Oklahoma cases say contrary to what was said by this court in *Parker* v. *Richard* that land is restricted only where its alienation is absolutely prohibited.

VII.

A void order of sale of land continues to be void no matter how great the lapse of time. Where title passes after the lapse of a period of time from the making of the order it passes by reason of the adverse possession and not by reason of the void order which of itself cannot give rights.

In *Frazier* v. *Jeakins*, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575, it was said:

> "If the act or transaction failed to deprive inter-

ested persons of their rights or titles, failed to confer them on someone else, the act or transaction is void as to such persons. If the act or transaction requires ratification, estoppel, or limitation to transfer the right or title, it is void until the ratification has been made, the estoppel has occurred, or the time has elapsed, and even then the right or title does not pass by virtue of the original act or transaction, but passes by virtue of the ratification, or is founded on the estoppel, or is set at rest by the lapse of time."

In *Sandlin* v. *Barker*, 95 Okl. 113, at 119, it is said:

"Without regard to the right to set aside the judgment ordering the sale of this real estate and confirming the administrator's sale, the purchaser at such sale who has gone into possession under the administrator's deed cannot be deprived of the property so purchased unless the action is maintained within the time provided in subdivision 2, section 46655, Rev. Laws 1910, or within the additional time of two years after the minor reaches his majority, if the five years' period runs before that time. This holding does not in any manner attempt to give life to a void judgment, which, as was said in *Pettis* v. *Johnston*, *supra*, 'Is a dead limb upon the judicial tree,' but simply precludes the holder of the title from asserting his title. This is very aptly expressed in *Grossbeck* v. *Seeley*, 13 Mich. 329, in the following language:

> 'If the proceedings to sell for taxes were illegal, no lapse of time can change their character, and they can never, therefore, become legal. If the tax purchaser obtains possession, and holds it until protected by a limitation law, he then becomes safe, not because his tax title is any more regular, but because the holder of the better title has become incapable of asserting it'."

VIII.

The Act of May 27th, 1908 (35 Stat. 312), did not make the interest of appellant free from restrictions on alienation even though the guardianship had been valid. It did not give any right to a guardian to alienate the inherited land of an adult full-blood Indian.

Appellees in their former brief seem to argue that since appellant was under guardianship his inherited land was free from all restrictions on alienation. The Act of May 27th, 1908, nowhere gives the guardian of an incompetent adult Indian the right to sell his land. Section 6 of that act only mentions "minors" and not "incompetents." Guardians of incompetents are given the right to lease but not the right to sell the land of their wards.

Appellees cited the following from Act of April 28, 1904 (33 Stat. 573):

> "And full and complete jurisdiction is hereby conferred upon the District Courts in said territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indian, freedman or otherwise."

There is nothing in this language which purports to give the guardian of an adult incompetent the right to sell his land.

That the land of the estate of a deceased Indian inherited by full-blood Indians could not be partitioned without further authorization from Congress was held in

Eysenbach, et al., v. *Naharkey*, 114 Okl. 217;
Coleman v. *Battiest*, 65 Okl. 71;
Lewis v. *Gillard*, 70 Okl. 231;
Hoodenpyl, et al., v. *Champion*, 71 Okl. 270.

Further, since as appellant contends the guardianship was void and the sale was void, the status of appellant so far as concerns restrictions on alienation of his land was the same as if there had been no purported guardianship. A void guardianship is the same as no guardianship.

Conclusion.

We respectfully request that this court hold regarding the statute of limitations of Oklahoma as was held by the Oklahoma court during the period of time when it is now contended the statute of limitations was running against appellant and reverse the judgment of the Oklahoma Supreme Court.

Respectfully submitted,

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